In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1574

MAZHAR JALIL, PETITIONER

v.

ROBERT E. HAMPTON, CHAIRMAN,
UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner, a citizen of the Republic of India, was admitted to the United States for permanent residence on August 8, 1969. Two days later, he applied to the Civil Service Commission to take a competitive examination for a civil service rating. The application was denied under Civil Service regulations which disqualify aliens for appointment in the federal civil service (5 C.F.R. 338.101, 302.203 (g)).

Petitioner then instituted this class action for declaratory and injunctive relief. He contends that the regulations excluding aliens from federal civil service employment, as well as various appropriation acts prohibiting the use of appropriated funds for the payment of salaries of alien employees of the Executive Branch (*e.g.*, Section 502 of the Public Works Appropriations Act, 1970, 83 Stat. 336-337), discriminate against aliens in violation of the Due Process Clause of the Fifth Amendment.

On petitioner's appeal from a dismissal of the complaint, the court of appeals remanded the case to the district court, stating (Pet. App. 8a-9a):

> The ultimate determinations whether either the President or the Commission acted without authority are, of course, mixed questions of law and fact which are inappropriate for decision on this sparse record. No findings of fact are included in the district court's order dismissing the complaint. In particular, there are no findings pertinent to the question whether the exclusion of aliens from the Executive Branch will "best promote the efficiency of that service."
>
> Consequently, in the interest of the orderly administration of justice, this case will be remanded to the district court for consideration of these issues. On the remand for consideration of the validity of the regulation, the district court may, of course, if it is necessary, consider the constitutional claims.

The court noted that, on the basis of the evidentiary hearing, the district court would be able to determine

"the actual impact of the ban on aliens, the number of aliens who might apply for federal positions, the number and type of positions for which citizenship might be a bona fide qualification, and the possibility that the Government's proper interests may be adequately safeguarded by a lesser restriction, which identified particular positions or classes of positions for which alienage might be a disqualification, *e.g.*, on grounds of sensitivity or security" (Pet. App. 11a-12a). Chief Judge Bazelon dissented on the ground that the court should have declared both the regulations and the Public Works Appropriations Act of 1970 invalid under the principles announced in *Graham* v. *Richardson*, 403 U.S. 365.

2. Although the constitutional issues raised by petitioner are substantial, their resolution by this Court should await (1) the development of the factual record which the court of appeals regarded as essential to the proper evaluation of petitioner's claims, and (2) the consideration of the claims by the courts below in light of that record.

Contrary to the view of the dissenting judge in the court of appeals, *Graham* v. *Richardson*, *supra*, is not dispositive of the constitutionality of the exclusion of aliens from federal employment. *Graham* involved state statutes denying public assistance to certain aliens. One of the grounds for this Court's invalidation of those statutes was that they encroached upon the exclusive federal power over the admission and residence of aliens. 403 U.S. at 378-

380.[1] Citing *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 419, the Court expressly reaffirmed Congress' exclusive power to determine "what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." 403 U.S. at 378.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

[1] Similarly, the power of the states to exclude aliens from state employment, presented in *Sugarman* v. *Dougall*, No. 71-1222, probable jurisdiction noted June 12, 1972, may be more limited than the power of the federal government to exclude aliens from federal employment.

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